IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-528

CLARENCE A. PIERCE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition For Writ of Certiorari To The Georgia Court Of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

HARRISON KOHLER
Assistant Attorney General

DARYL A. ROBINSON
Assistant Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

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QUESTIONS PRESENTED

1.

Did the devices seized from Petitioner constitute expression protected under the First and Fourteenth Amendments, and may the State regulate devices designed or marketed primarily for the stimulation of human genital organs?

2.

Was the jury instruction on the knowledge required for a conviction under Ga. Code Ann. § 26-2101 constitutional?

3.

Was the seizure of sexual devices by police officers from Petitioner constitutional?

STATEMENT OF THE CASE

The facts of this case are not in dispute.[1] On July 3, 1975, Officer Thomas Alexander, Atlanta Police Department Vice Squad, and Ira W. Brown, an Investigator with the Fulton County Solicitor's Office, accompanied by other officers, entered the Climax Book Store in Atlanta, Georgia. (T. 23-24).[2] There they purchased from Petitioner Clarence Pierce a magazine entitled Sex Play and a book entitled Vera's Magic Tongue. (T. 27-28).

The officers took the purchased items outside, examined them, then went back into the store and arrested Petitioner. (T. 27, 30). The officers then seized and inventoried paraphernalia displayed in a transparent glass showcase in the store.[3] (T. 59-71, 112-13).

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[1] Petitioner Clarence Pierce neither testified nor presented other evidence at his trial.

[2] T. refers to the transcript of Petitioner's trial in the Criminal Court of Fulton County, Georgia.

[3] The officers seized 19 dildos, four rubber vaginas, one rubber vagina with anus, five rotating dildos with cranks, two battery operated French ticklers, 23 penis extensions, 21 stimulator kits containing vibrators with anal and French tickler sleeves and 24 dildos with straps.

Petitioner was charged with distributing obscene materials in violation of Ga. Code Ann. § 26-2101 (R. 3).[4] He was tried and convicted on November 23 and 24, 1976, and sentenced to twelve months imprisonment and a $5,000.00 fine. (T. 10-11).

He appealed to the Supreme Court of Georgia which held Ga. Code Ann. § 26-2101 to be constitutional and then transferred the case to the Georgia Court of Appeals. See Pierce v. State, 239 Ga. 844, 239 S.E.2d 28 (1977). The Georgia Court of Appeals affirmed, Pierce v. State, 145 Ga. App. 680, 244 S.E.2d 589 (1978); the Supreme Court of Georgia denied the petition for writ of certiorari.

[4] R. refers to the appellate record prepared by the Clerk of the Criminal Court of Fulton County.

REASONS FOR NOT GRANTING THE WRIT

A. THE DEVICES SEIZED FROM PETITIONER DID NOT CONSTITUTE EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS, AND THE STATE MAY REGULATE DEVICES DESIGNED OR MARKETED PRIMARILY FOR THE STIMULATION OF HUMAN GENITAL ORGANS.

The issue of whether sexual devices, such as dildos, are expression protected by the First and Fourteenth Amendments, was presented to this Court on appeal and dismissed for want of a substantial federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed.2d 76 (1978); Simpson v. Georgia, ___ U.S. ___, 24 Crim. L. Rptr. 4033 (1978).

The Georgia Court of Appeals did not base its affirmance of Petitioner's conviction on the findings that magazines seized from Petitioner were obscene, for the publications seized were not transmitted to the Appellate Court. Pierce v. State, supra, 145 Ga. App. at 681. Petitioner's conviction was affirmed because the jury could lawfully have been convinced that the items of sexual paraphernalia were obscene. Id.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C. § 1462 and thereby obscene. United States v. Gentile, 211 F.Supp. 383 (D. Md. 1962). The language in 18 U.S.C. § 1462 has been held to be constitutional. United States v. Orito, 413 U.S. 139 (1973). A state court has applied an obscenity statute to artificial penises. People v. Clark, 304 NYS 326 (1969).

Ga. Code Ann. § 26-2101 does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as

it does not fall within the prohibition announced in Stanley v. Georgia, 394 U.S. 557 (1969). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973).

Petitioner alleges that the standards or guidelines set forth in Miller v. California, 413 U.S. 15 (1973), used in determining obscenity in press materials, apply to the devices described and prohibited by § 26-2101(c). However, the Miller guidelines were set up by this Court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of the press. The devices prohibited by § 26-2101(c) are neither speech nor press materials and are, therefore, not protected by the First Amendment.

Petitioner has compared the Georgia obscenity statute with that dealt with by this Court in Griswold v. Connecticut, 381 U.S. 479 (1965). However, in Griswold, this Court dealt with statutes prohibiting the use of contraceptives and recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." Id. at 485.

The Georgia statute does not blanketly prohibit the use of devices described in §26-2101(c). There is an exception whereby persons, married or single, can avail themselves of such devices. See Ga. Code Ann. § 26-2101(e). The procedure required in this exception is similar to that required for the dispersing of most prescription drugs, including those for birth control.

The devices described in Ga. Code Ann. § 26-2101(c) do not constitute expression protected by the First and Fourteenth Amendments, and the State of Georgia may lawfully regulate these devices.

B. THE JURY INSTRUCTION ON THE KNOWLEDGE REQUIRED FOR A CONVICTION UNDER GA. CODE ANN. § 26-2101 WAS CONSTITUTIONAL.

An essential element in the crime of distributing obscene materials in Georgia is that the accused knows the "obscene nature" of the material. Ga. Code Ann. § 26-2101(a). Knowing is defined as either actual knowledge of the obscene contents or "knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." Id. At Petitioner's trial, the judge charged the jury concerning these principles. (2T. 10).

Previous appeals that such a charge is unconstitutional have already been dismissed by this Court for want of a substantial federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed.2d 76 (1978); Teal v. Georgia, ___ U.S. ___, 56 L. Ed.2d 79 (1978); Simpson v. Georgia, ___ U.S. ___, 24 Crim. L. Rptr. 4033 (1978). Also this Court has recently denied writs of certiorari concerning this issue. See Wood v. Georgia, ___ U.S. ___, 24 Crim L. Rptr. 4037 (1978); Allen v. Georgia, ___ U.S. ___, 24 Crim. L. Rptr. 4037 (1978).

The trial court's charge is consistent with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when this Court held that the person charged with the offense of mailing obscene material must know or have notice of the contents of the material.

> "The inquiry, in proceedings under the [obscenity] statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited

> in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails [Emphasis added]." Rosen v. United States, 161 U.S. 29, 41 (1896).

The Georgia statute is similar to New York statutes dealt with by this Court in Mishkin v. New York, 383 U.S. 502 (1966) and Ginsberg v. New York, 390 U.S. 629 (1968).

The Mishkin case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter", and it defined the required mental element in these terms:

> "a reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . . ." Mishkin v. New York, supra at 510. See Ginsberg v. New York, supra at 644.

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice", while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware." The statute dealt with in Ginsberg defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither Mishkin nor Ginsberg required actual knowledge of the obscenity of the material. Both cases were reviewed and followed in Hamling v. United States, 418 U.S. 87 (1974), where this Court construed 18 U.S.C. § 1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the Constitution." Id. at 123-24.

In the case of Kuhns v. California, 431 U.S. 973 (1977), this Court denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter . . . ." California v. Kuhns, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Petitioner concedes that proof of scienter may be made by circumstantial evidence. To prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

At Petitioner's trial, Georgia law required and the jury was instructed that the State had to prove, as a bare minimum, that Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" was required by Rosen v. United States, supra; "in some manner aware" was sufficient in Mishkin v. New York, supra; "reason to know" was sufficient in Ginsberg v. New York, supra; "be aware of the character of the matter" was sufficient in California v.

Kuhns, supra; and proof of knowledge of the legal status of the material was not required. Hamling v. United States, supra.

C. THE SEIZURE OF THE SEXUAL DEVICES BY POLICE OFFICERS FROM PETITIONER WAS CONSTITUTIONAL.

It is undisputed that (1) the Climax Book Store was open to the public, (2) Petitioner was operating the store when the officers entered, and (3) the sexual devices were in plain view in a transparent glass showcase.

What a person knowingly exposes to the public, even in his own home or office, is not subject to a Fourth Amendment protection. See Katz v. United States, 389 U.S. 347, 351 (1967). Contraband items in plain view of police officers, in a place where officers have a right and are authorized to be, are subject to seizure and may be seized without a search warrant. Harris v. United States, 390 U.S. 234, 236 (1968). Since the sexual devices were not books or films, which have First Amendment protection, no warrant was required for the seizure of the devices. See generally, Roaden v. Kentucky, 413 U.S. 496, 501-02 (1973).

The allegation that such a seizure required prior issuance of a warrant has already been rejected as not presenting a substantial federal question. Sewell v. Georgia, ___ U.S. ___, 56 L. Ed.2d 76 (1978); Teal v. Georgia, ___ U.S. ___, 56 L. Ed.2d 79 (1978); Simpson v. Georgia, ___ U.S. ___, 24 Crim L. Rptr. 4033 (1978).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS
Executive Assistant
Attorney General

Don A. Langham
DON A. LANGHAM
First Assistant
Attorney General

John C. Walden
JOHN C. WALDEN
Senior Assistant
Attorney General

Harrison Kohler
HARRISON KOHLER
Assistant Attorney General

Daryl A. Robinson
DARYL A. ROBINSON
Assistant Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three copies of this Brief for Respondent in Opposition upon the Petitioner by depositing three copies of the Brief in the United States mail, with proper address and adequate postage to:

Mr. Robert Eugene Smith
Attorney at Law
1409 Peachtree Street, N. E.
Atlanta, Georgia 30309

This _____ day of November, 1978.

Harrison Kohler
HARRISON KOHLER

see

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